

Apr 08, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

MICHAEL THOMAS VAN DYKE,

Defendant.

No. 2:15-CR-0025-JLQ-1

ORDER DENYING DEFENDANT'S  
MOTION TO REDUCE SENTENCE

Before the Court are Defendant's Motion for Reduction of Sentence and Motion to Expedite the same. ECF Nos. 162, 163. These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Defendant's Motion for Sentence Reduction is DENIED.

**BACKGROUND**

On September 28, 2015, a Judgment and Sentence was entered against Defendant finding him guilty of Count 1 of the Indictment in violation of 18 U.S.C. § 2423(b), Travel with Intent to Engage in Illicit Sexual Conduct. ECF No. 65. He was sentenced to 36 months of imprisonment to be followed by 10 years of supervised release. ECF No. 65. Defendant began his initial term of supervised release on June 2, 2018. On October 30, 2018, Defendant was found in violation of the conditions of his supervised release for being in possession of marijuana, being in possession of a laptop with access to the internet, and that laptop's browsing history included pornographic websites. ECF No. 103. It was noted that there was evidence of sex chatting via Skype found on the laptop. ECF No. 103. Supervision was revoked, and Defendant was sentenced to 3 months incarceration to be followed by 10 years of supervised release. ECF Nos. 102, 104. His second term of supervised release began on March 1, 2019. On February 24, 2020 a supervised release

1 revocation hearing was held, and Defendant was found in violation of his conditions of  
2 supervised release for 2 counts of failing to participate in sex offender treatment, 5 counts  
3 failing to abstain from the use of a controlled substance, and 1 count of failing to report for  
4 drug testing. ECF Nos. 159, 160. Supervised release was revoked, and Defendant was  
5 sentenced to six months of incarceration with credit for time served to be followed by 120  
6 months of supervised release. ECF No. 160. Defendant has been incarcerated at the  
7 Spokane County Jail since his arrest on February 12, 2020. ECF Nos. 151, 162 at 2. He is  
8 currently awaiting Bureau of Prisons' (BOP) designation and transfer. ECF No. 162 at 3.

9 Defendant argues that he should be granted compassionate release under 18 U.S.C.  
10 § 3582(c)(1)(A) based on his chronic medical conditions, the nature of the medical care and  
11 supplies available at the Spokane County Jail, and the risk of exposure and severe symptoms  
12 from COVID-19 pandemic. ECF No. 162. Defendant alleges that the Government does not  
13 oppose Defendant's Motion for Compassionate Release Reduction. ECF No. 162 at 1.

## 14 **DISCUSSION**

### 15 **A. Eligibility for Compassionate Release**

16 Federal courts have the statutory authority to modify an imposed term of  
17 imprisonment for two reasons: compassionate release under 18 U.S.C. § 3582(c)(1) or based  
18 on a change in the sentencing guidelines under 18 U.S.C. § 3582(c)(2). Previously, motions  
19 for compassionate release could only be brought to the Court by the Director of the BOP.  
20 18 U.S.C. § 3582(c)(1)(A) (2002). However, after the December 2018 passage of the First  
21 Step Act, defendants may now bring their own motions for compassionate release after  
22 exhausting administrative remedies within the BOP. 18 U.S.C. § 3582(c)(1)(A) (2018).

23 The Court finds that Defendant has effectively exhausted his administrative remedies  
24 as he does not have any administrative path or remedies he can pursue. Defendant is housed  
25 at the Spokane County Jail, and all transports to BOP Custody have been ceased due to  
26 COVID-19 and the State of Washington's efforts to avoid further transmission of the virus.  
27 Defendant is not in the custody of the BOP. Therefore, there is no warden to petition. Any  
28 further attempts to exhaust administrative remedies at this time would require Defendant to

1 continue to wait in the Spokane County Jail until transfer, to make the request of the warden  
2 at the BOP facility once he is transferred, and wait for the request to be denied or for 30 days  
3 to elapse following the request. Any attempts to exhaust administrative remedies would be  
4 futile. Accordingly, Defendant's Motion for Reduction of Sentence is properly before the  
5 Court.

6 A defendant may be eligible for compassionate release: (1) if the Court finds  
7 "extraordinary or compelling reasons" to warrant a sentence reduction; or (2) if the  
8 defendant is at least 70 years old, has served at least 30 years in prison pursuant to a sentence  
9 imposed for the offense for which the defendant is currently imprisoned, and the defendant  
10 is determined not to pose a risk of danger to the community. 18 U.S.C. § 3582(c)(1)(A).  
11 Under either eligibility prong, the Court must also find that a sentence reduction is  
12 "consistent with applicable policy statements issued by the [United States] Sentencing  
13 Commission." 18 U.S.C. § 3582(c)(1)(A). The Sentencing Guidelines instruct that the Court  
14 should consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when deciding a  
15 motion for compassionate release, and that the Court should not grant a sentence reduction  
16 if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act.  
17 U.S.S.G. § 1B1.13.

#### 18 **B. Extraordinary and Compelling Reasons**

19 Defendant moves for compassionate release on the grounds that "extraordinary and  
20 compelling reasons" justify a sentence reduction. ECF No. 162 at 12-15. The First Step Act  
21 did not define "extraordinary and compelling reasons," but the compassionate release  
22 statute directs the Court to consider the Sentencing Commission's policy statements when  
23 deciding compassionate release motions. 18 U.S.C. § 3582(c)(1)(A).

24 The Sentencing Commission's policy statement on sentence reduction mirrors the  
25 language of the compassionate release statute, but it has not yet been updated to reflect the  
26 procedural changes implemented by the First Step Act. U.S.S.G. § 1B1.13. "While that  
27 particular policy statement has not yet been updated to reflect that defendants (and not just  
28 the [Bureau of Prisons ("BOP")]) may move for compassionate release, courts have

1 universally turned to U.S.S.G. § 1B1.13 to provide guidance on the 'extraordinary and  
2 compelling reasons' that may warrant a sentence reduction." *United States v. McGraw*,  
3 No. 2:02-cr-00018-LJM-CMM, 2019 WL 2059488, at \*2 (S.D. Ind. May 9, 2019) (gathering  
4 cases). The sentence reduction policy statement outlines four categories of circumstances  
5 that may constitute "extraordinary and compelling reasons" for a sentence reduction: (1) the  
6 defendant suffers from a medical condition that is terminal or substantially diminishes the  
7 defendant's ability to provide self-care in a correctional environment; (2) the defendant is at  
8 least 65 years old, is experiencing a serious deterioration in health due to the aging process,  
9 and has served at least 10 years or 75% of his term of imprisonment; (3) family  
10 circumstances involving the death or incapacitation of the caregiver of the defendant's minor  
11 child or the incapacitation of the defendant's spouse or registered partner; or (4) other  
12 reasons, other than or in combination with the other listed circumstances, that are  
13 extraordinary and compelling. U.S.S.G. § 1B1.13, Application Note 1.

14 Defendant was born with spina bifida, which has left him in a wheelchair. Because  
15 of his paraplegic status, he has suffered from an increased risk of infections. He has a history  
16 of osteomyelitis, or infection of the bones. He has suffered from sepsis. After suffering  
17 particularly acute infections, surgery was required to remove his hip bones. His history of  
18 infection and compromised immunity renders him particularly at risk during the COVID-19  
19 pandemic. Defendant reports through his counsel that he is suffering from MRSA and septic  
20 infection. He reports that jail staff are only giving him Tylenol and covering the wound.  
21 They are not giving him enough adult diapers to stay dry, which further compromises his  
22 open wound. ECF No. 162 at 14-15.

23 Defendant moves for compassionate release on the grounds that his multiple chronic  
24 illnesses and difficulty treating his chronic illnesses while in custody place him at an  
25 increased risk for the potentially devastating symptoms of COVID-19 and this constitutes  
26 "extraordinary and compelling reasons" for a sentence reduction. ECF No. 162. Defendant  
27 does not allege that his present conditions are terminal. He indicates that being incarcerated  
28 limits his self-care, but also acknowledges that these conditions existed prior to his current

1 incarceration. ECF No. 16 at 14-15. Defendant's current medical reasons were in existence  
2 during his prior two incarcerations and did not warrant a motion for reduced sentence for  
3 compassionate release. Therefore, his current motion for compassionate release is best  
4 addressed under the "other reasons" category.

5 **C. Sentencing Commission Policy Statements**

6 The Sentencing Guidelines instruct that the Court should consider the sentencing  
7 factors set forth in 18 U.S.C. § 3553(a) when deciding a motion for compassionate release,  
8 and that the Court should not grant a sentence reduction if the defendant poses a risk of  
9 danger to the community, as defined in the Bail Reform Act. U.S.S.G. § 1B1.13. The Court  
10 acknowledges that the Government does not oppose the motion. However, Defendant's  
11 motion does not speak to whether he presents a risk of danger to the community as  
12 articulated in 18 U.S.C. § 3142(g). Defendant's motion cites a bail determination in which  
13 a judge found a defendant being incarcerated increased the risk to the community because it  
14 presented an increased risk of the spread of COVID-19. ECF No. 162 at 16. Defendant's  
15 motion does not address his specific risk to the community concerning his history of  
16 supervised release violations and his resistance to sex offender treatment.

17 Defendant's history of repeated supervised release violations demonstrates a disregard  
18 for the conditions the Court has placed upon him. Of particular concern are Defendant's  
19 history of possessing technology with internet access, evidence of accessing pornographic  
20 websites, and evidence of sex chatting. ECF No. 103. Most recently, Defendant had five  
21 controlled substance violations in less than a year from his release from custody. ECF  
22 No. 160. Furthermore, Defendant has shown resistance to participating in his sex offender  
23 treatment. ECF Nos. 143, 160. Defendant has failed to provide any evidence that there is a  
24 suitable release residence or provided any release plan to ensure that Defendant is properly  
25 monitored and participates in his sex offender treatment. Therefore, the Court finds that  
26 Defendant is a danger to the community and DENIES his motion for compassionate release.  
27 Accordingly,

28 **IT IS ORDERED** that:

1           1. Defendant's Motion to Expedite, filed April 7, 2020, **ECF No. 163**, is  
2 **GRANTED.**

3           2. Defendant's Motion for Reduction of Sentence filed April 7, 2020, **ECF No. 162**,  
4 is **DENIED.**

5           The District Court Executive is directed to file this Order and provide copies to  
6 counsel **AND TO** the United States Probation Office.

7           **DATED** this 8th day of April, 2020.



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WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE

04-08-20